



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

DEC 22 2004

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Joseph E. Sandler, Esq.
Sandler, Reiff & Young, P.C.
50 E Street, SE
Suite 300
Washington, DC 20003

RE: MUR 5440
DNC Services Corporation/Democratic
National Committee and Andrew Tobias, as
Treasurer

Dear Mr. Sandler:

On September 30, 2004, the Federal Election Commission notified your clients, DNC Services Corporation/Democratic National Committee and Andrew Tobias, as Treasurer (the "DNC"), of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended ("the Act"). A copy of the complaint was forwarded to your clients at that time.

Upon further review of the allegations contained in the complaint, the Commission, on December 13, 2004, found that there is reason to believe that the DNC violated 2 U.S.C. §§ 441a and 434, provisions of the Act. The Factual and Legal Analysis, which formed a basis for the Commission's finding, is attached for your information. Please note that respondents have an obligation to preserve all documents, records and materials relating to the Commission's investigation.

You may submit any factual or legal materials that you believe are relevant to the Commission's consideration of this matter. Please submit such materials to the General Counsel's Office

within 30 days of receipt of this letter. Where appropriate, statements should be submitted under oath. In the absence of additional information, the Commission may find probable cause to believe that a violation has occurred and proceed with conciliation.

If you are interested in pursuing pre-probable cause concilia request in writing. See 11 C.F.R. § 111.18(d). Upon receipt of the the General Counsel will make recommendations to the Commissio

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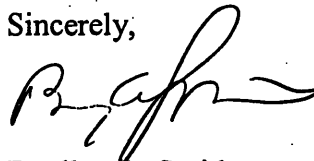
agreement in settlement of the matter or recommending declining that pre-probable cause conciliation be pursued. The Office of the General Counsel may recommend that pre-probable cause conciliation not be entered into at this time so that it may complete its investigation of the matter. Further, the Commission will not entertain requests for pre-probable cause conciliation after briefs on probable cause have been mailed to the respondent.

Requests for extensions of time will not be routinely granted. Requests must be made in writing at least five days prior to the due date of the response and specific good cause must be demonstrated. In addition, the Office of the General Counsel ordinarily will not give extensions beyond 20 days.

This matter will remain confidential in accordance with 2 U.S.C. §§ 437g(a)(4)(B) and 437g(a)(12)(A), unless you notify the Commission in writing that you wish the investigation to be made public.

If you have any questions, please contact Mark Goodin, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,



Bradley A. Smith
Chairman

Enclosures

Factual and Legal Analysis

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FEDERAL ELECTION COMMISSION
FACTUAL AND LEGAL ANALYSIS

RESPONDENT: DNC Services Corporation/Democratic National MUR: 5440
 Committee and Andrew Tobias, as Treasurer

I. INTRODUCTION

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This matter was generated by a complaint filed with the Federal Election Commission ("the Commission") by Bush-Cheney '04, Inc. The complaint in MUR 5440 (the "Complaint") alleges, among other things, that The Media Fund ("TMF") has coordinated its activities with the DNC Services Corporation/Democratic National Committee and Andrew Tobias, as Treasurer (collectively, the "DNC"). On November 8, 2004, the DNC responded to the Complaint (the "DNC Response"). Upon review of the allegations in the Complaint, the DNC Response, and information on the public record, the Commission finds reason to believe that the DNC violated 2 U.S.C. §§ 441a(f) and 434 by accepting, and failing to report, excessive in-kind contributions, in the form of coordinated communications, from TMF.

II. FACTUAL AND LEGAL ANALYSIS

A. FACTS

The Complaint alleges that TMF has coordinated with the DNC as a result of the activities of Harold Ickes. Harold Ickes, the founder and President of TMF, is a member of the DNC's Executive Committee. The Complaint states that "[i]t defies credibility that the plans [Ickes] is now executing with soft dollars from the Media Fund were not discussed as a 'need' or a 'project' by the DNC's executive committee during this election cycle, or that he is not 'using' information he learned from his DNC position as part of his soft money Section 527 political activities." Complaint at 59. By virtue of his DNC position, Ickes allegedly knew that Kerry

would need financial assistance after the primaries, knew in which broadcasting markets the assistance would be needed, and has used that knowledge in carrying out TMF's communications and activities.

B. ANALYSIS

The Complaint alleges that various respondents made expenditures for coordinated communications.¹ See 11 C.F.R. § 109.21. A communication is coordinated with a candidate, an authorized committee, a political party committee, or agent thereof if it meets a three-part test: (1) payment by a third party; (2) satisfaction of one of four "content" standards;² and (3) satisfaction of one of six "conduct" standards. 11 C.F.R. § 109.21. The conduct standards include:

- (1) communications made at the "request or suggestion" of the relevant candidate or committee;
- (2) communications made with the "material involvement" of the relevant candidate or committee;
- (3) communications made after "substantial discussion" with the relevant candidate or committee;
- (4) specific actions of a "common vendor";
- (5) specific actions of a "former employee"; and
- (6) specific actions relating to the dissemination of campaign material.

11 C.F.R. §§ 109.21(d)(1)-(6). The entity (candidate, authorized committee, or party committee) with whom or which a communication is coordinated does not accept an in-kind contribution that results from the "common vendor" or "former employee" conduct standards unless the entity, or

¹ The Complaint also generally alleges that certain respondents made coordinated expenditures for purposes other than communications. An expenditure that is coordinated with a candidate or party committee constitutes an in-kind contribution. See 2 U.S.C. § 441a(a)(7)(B); 11 C.F.R. § 109.20(a) and (b).

² In *Shays v. FEC*, 02-CV-1984, slip op. at 32-48, 156-57 (D.D.C. Sept. 18, 2004) (notice of appeal filed Sept. 28, 2004) the District Court invalidated the content standard of the coordinated communications regulation and remanded it to the Commission for further action consistent with the Court's opinion. In a subsequent ruling, the Court explained that the "deficient rules technically remain 'on the books,'" and did not enjoin enforcement of this (or any other) regulation pending promulgation of a new regulation. *Shays v. FEC*, 02-CV-1984, slip op. at 2 (D.D.C. Oct. 19, 2004).

an agent thereof, is ultimately found to have engaged in conduct described by conduct standards (1) through (3). 11 C.F.R. § 109.21(b)(2).

The DNC argues that the Complaint does not state any violation by the DNC of the Act or the Commission's regulations.³ The DNC assumes "for the sake of argument that the 'content' standard has been met," and generally argues that the Complaint does not state "any facts that could show that the 'conduct' standard has been met." DNC Resp. at 5.

The DNC's response is based on the argument that Ickes was not an "agent" of the DNC. See DNC Resp. at 5-6. Section 109.3 provides that, for purposes of the coordination regulations, an "agent" is a "person who has actual authority, either express or implied, to engage in" certain activities related to the making of communications. 11 C.F.R. § 109.3. The DNC argues that Ickes's mere membership (along with 60 others) on the DNC Executive Committee does not provide him with the "authority to do anything relating to paid communications by the DNC" or make him an "agent" of the DNC under the regulations, and therefore his activity does not satisfy the "conduct" standard of the coordinated communication regulations.⁴ DNC Resp. at 5-

³ The DNC also makes two procedural arguments. First, it contends that the DNC is not a proper respondent because it was not specifically named as such by the complainant. DNC Resp. at 2-3. Second, the DNC argues that the delay between the filing of the Complaint and the date on which it received notice "may well have prejudiced the DNC's ability to defend itself in this matter." DNC Resp. at 3. Neither of these arguments withstands scrutiny. As to the former argument, respondent status does not depend on a party's presence in the caption of a complaint. Instead, as is the case here, the presence of sufficiently specific allegations in a complaint that a party has violated the Act triggers the respondent's rights of notice and an opportunity to respond. See 2 U.S.C. § 437g(a)(1). As to the latter argument, in the absence of bad faith or prejudice, the alleged untimeliness of a complaint notice does not bar the Commission from proceeding against that respondent. See, e.g., *FEC v. Franklin*, 718 F. Supp. 1272, 1277 (E.D. Va. 1989), *affirmed in part, vacated in part on other grounds*, 902 F.2d 3 (1989) (no suggestion of bad faith on the part of the Commission); *FEC v. National Rifle Ass'n*, 553 F. Supp. 1331, 1345 (D.D.C. 1983) (even where Commission inadequately performed or omitted notice or conciliation obligations, such error may be excused where the act or omission was not intentional and where it caused no prejudice); *EEOC v. Shell Oil Co.*, 466 U.S. 54, 66 n.16 (1984) (in absence of proof of bad faith on the part of EEOC, agency's failure to notify employer of discrimination charge within statutory time limit does not bar a subsequent suit). The DNC does not describe how it suffered any prejudice or suggest that the Commission has acted in bad faith.

⁴ The DNC addresses only two of the six conduct standards of the coordinated communication test. It concludes that, based on the alleged failure to demonstrate that Ickes was an agent of the DNC, neither the "material

6. The DNC also contends that nothing in the “Charter or Bylaws of the DNC suggests the existence of any such authority ...; no corporate resolution of the ... fiscal arm of the DNC ... confers any such authority; and there are no facts set forth in the Complaint indicating the existence of any such authority.” DNC Resp. at 6 and Ex.G.

A finding that TMF engaged in coordinated communications depends, at this stage, on an analysis of its activities under the “conduct” prong of the coordinated communication test, the “payment” and “content” prongs having been met (and the DNC does not contest the elements other than “conduct”).⁵ DNC Resp. at 4-5. Here, an investigation of whether TMF engaged in coordinated communications for the benefit of the DNC may be based on the “material involvement” conduct standard. The “material involvement” standard is satisfied if:

A candidate, an authorized committee, a political party committee, or an agent of any of the foregoing, is materially involved in decisions regarding:

- (i) The content of the communication;
- (ii) The intended audience for the communication;
- (iii) The means or mode of the communication;
- (iv) The specific media outlet used for the communication;
- (v) The timing or frequency of the communication; or
- (vi) The size or prominence of a printed communication, or duration of a communication by means of broadcast, cable or satellite.

11 C.F.R. § 109.21(d)(2).

involvement” (Section 109.21(d)(2)) nor the “substantial discussion” (Section 109.21(d)(3)) conduct standard can be satisfied.

⁵ The first prong of the coordinated communication test is satisfied because TMF—the entity that paid for the communications at issue—is a “person other than [the] candidate, authorized committee, political party committee, or agent of any of the foregoing.” 11 C.F.R. § 109.21(a)(1). TMF meets the second prong (the “content” standard) of this test because it aired advertisements that qualify as “public communications” under Section 109.21(c)(4). The scripts of purported TMF ads make the following statements: (1) “George Bush’s priorities are eroding the American dream. It’s time to take our country back from corporate greed and make America work for every American”; (2) “George W. Bush is taking our country in the wrong direction. It’s time to make America work for every American”; and (3) “When it comes to choosing between corporate values and family values, face it, George Bush is not on our side.” These advertisements meet the candidate identification requirement of Section 109.21(c)(4)(i), and appear to meet the timing and targeting requirements of Sections 109.21(c)(4)(ii) and (iii).

Any potential coordinated communication by TMF for the benefit of the DNC is not dependent on a determination that Ickes is an “agent” of the DNC. Reading the “material involvement” prong to require the existence of an agency relationship between Ickes and the DNC—as the DNC argues—would lead to an absurd reading of the coordination regulation as a whole. It would mean that absent evidence that the DNC had authorized Ickes to act as its agent, there could be no finding of coordination against TMF, even if Ickes may have used material information he obtained from the DNC in the creation, production, or distribution of TMF’s ads. On the other hand, if Ickes had resigned his position with the DNC some time before TMF ran ads meeting the content standard then, under the “former employee” conduct standard, one could establish coordination merely by showing that Ickes had used information about the DNC’s plans, projects, or needs in connection with TMF’s ads. In other words, such a reading would make it *more difficult* to establish coordination based on circumstances where Ickes simultaneously held leadership positions at the DNC and TMF than it would be if Ickes had resigned his position with the DNC.

Such a conclusion defies common sense and is inconsistent with the Commission’s explanation of the “material involvement” prong of the regulation. The Commission described the “material involvement” standard as “necessary to address forms of ‘real world’ coordination that would not be addressed in any of the other conduct standards,” noting that the operation of this standard is “necessarily fact-based.” Explanation & Justification, “Coordinated and Independent Expenditures,” 68 Fed. R. 421, 433 (Jan. 3, 2003) (“E&J”). The potential use of inside information by a person who has leadership positions in both a spending organization and a recipient committee is a type of “real world” coordination not directly addressed by any of the other conduct standards.

Moreover, the Commission also explained that, in order to be “materially involved” in decisions enumerated in Section 109.21(d)(2), the “representatives of [a] political party committee need not be present or included during [the] formal decisionmaking process but need only participate to the extent that he or she assists the ultimate decisionmaker, much like a lawyer who provides legal advice to a client is materially involved in a client’s decision even when the client ultimately makes the decision.” *Id.* at 434. It is also notable that the “material involvement” standard describes conduct—in the disjunctive—by “[a] candidate, an authorized committee, a political party committee, or an agent of any of the foregoing.” *Id.* Accordingly, apart from the activity through an authorized agent, a “political party committee” may be materially involved in the activity by furnishing a decisionmaker for the spending organization with access to party information that is material to the spending organization’s advertising.⁶ In the present matter, we believe that the DNC satisfied the “material involvement” standard because of the conduct of one of its Executive Committee members—Ickes.

Ickes simultaneously held leadership positions in both the DNC and TMF. According to the Charter of Democratic Party of the United States (as amended Jan. 19, 2002), the Executive Committee of the DNC “shall be responsible for the conduct of the affairs of the Democratic Party....” DNC Resp., Ex. G at 5. This role of the Executive Committee provides a basis to infer that Ickes—as a member of the Executive Committee—had access to inside information and people who possessed such information. In other words, Ickes was in a position with the

⁶ In its explanation of these rules, the Commission has repeated the disjunctive formulation of the persons at issue under the “material involvement” standard. “[A] candidate, authorized committee, or political party committee is considered ‘materially involved’ in the decisions enumerated in paragraph (d)(2) after sharing information about plans, projects, activities, or needs with the person making the communication, but only if this information is found to be material to any of the above-enumerated decisions related to the communication.” E&J at 434.

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DNC where he would likely have had access to material information about the DNC's plans, projects, or needs, and was in a position with TMF to use that information to make decisions in connection with TMF communications. During the relevant period, both TMF and the DNC shared the goal of electing the Democratic nominee for President, and both engaged in extensive ad campaigns. By focusing entirely on whether the DNC had authorized Ickes to act as its agent, the DNC fails to refute a reasonable inference from these circumstances, which is that Ickes had access to material information about the plans and needs of the DNC, and that he used such information in determining the content, means, intended audience, specific media outlet, timing, and other factors for communications made by TMF.

These circumstances at least warrant an investigation. Complainants will rarely, if ever, be aware of anything more than circumstances facilitating coordination. We cannot know what information Ickes may have had (and may have used) without an investigation.

In addition to the "material involvement" conduct standard, the facts present a basis to investigate whether the "request or suggestion" or "substantial discussion" elements might also be satisfied. *See* 11 C.F.R. § 109.21(d)(1) and (3). The "substantial discussion" conduct prong (Section 109.21 (d)(3)) covers communications produced "after one or more substantial discussions about the communication between the person paying for the communication [or that person's employees or agents]" and any from a list of persons including a political party committee or its agents. 11 C.F.R. § 109.21(d)(3). "A discussion is substantial within the meaning of this paragraph if information about the [party committee's] campaign plans, projects, activities or needs is conveyed to a person paying for the communication, and that information is material to the creation, production, or distribution of the communication...." *Id.* As described in our analysis of the "material involvement" standard, Ickes's leadership positions in both TMF

and the DNC creates an inference about his access to information at the DNC concerning that party committee's "plans, projects, activities, or needs." The DNC's response does not foreclose the basis for investigating whether any such discussions took place.

Even if an analysis of TMF's potential coordination with the DNC depended on a finding that Ickes was an "agent" of the DNC, there is sufficient information to investigate whether he acted in that role. The available facts raise a question as to whether Ickes in fact acted as an agent of the DNC when he formed, and directed the activities of, TMF. The DNC has not fully responded to this question. It merely asserts in a conclusory fashion that Ickes was not the DNC's agent and argues only that nothing about his position on the Executive Committee authorized him *ex officio* to act on the DNC's behalf with respect to any third party. DNC Resp. at 5-6. The DNC did not, for example, provide sworn statements, or even assert, that Ickes was not authorized by the DNC to act on its behalf at any time.

The DNC contends that no provisions of the DNC's Charter or Bylaws, or other resolutions, confer authority on Ickes—as an Executive Committee member—to be an "agent" under the regulations. Such sources of authority, however, do not seem to offer an exhaustive list of the means by which Ickes may be considered an "agent." Moreover, the fact that the Executive Committee meetings were open to the public does not foreclose the possibility that, in a context other than those meetings, the DNC could have provided actual authority to Ickes to act as an agent.⁷ Accordingly, the threshold question of whether Ickes was in fact the DNC's agent is not resolved, and an investigation will be necessary to resolve it.

⁷ While there is no legal requirement that respondents submit declarations from persons under their control who may have knowledge as to whether or not they acted to coordinate a particular communication, it is notable that the DNC did not attach such a document, which would have shed light on the scope of Ickes's activity with respect to the DNC. Moreover, the Commission has explained that the limitations found within the definition of "agent" are not "intended to establish any presumption against the creation of an agency relationship," and that an agency determination is "necessarily evaluated on a case-by-case basis." E&J at 425.

MUR 5440

DNC Services Corporation/Democratic National Committee
and Andrew Tobias, as Treasurer

III. CONCLUSION

The Commission finds reason to believe that the DNC Services Corporation/Democratic National Committee and Andrew Tobias, as Treasurer, violated 2 U.S.C. §§ 441a(f) and 434 by accepting, and failing to report, excessive in-kind contributions from The Media Fund.

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